

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BONNIE LOPEZ, individually as sister
and Special Administrator for the
Estate of MELODY MORGAN,
deceased; COLLEEN LACKEY,
individually as mother of MELODY
MORGAN, deceased,

Plaintiffs,

v.

THE STATE OF NEVADA ex rel.
NEVADA DEPARTMENT OF
CORRECTIONS, WARDEN DWIGHT
NEVEN, individually; GARY
PICCININI, ASSISTANT WARDEN,
individually; BRYAN SHIELDS,
individually; OFFICER JOEL
TYNNING, individually; OFFICER
KARISSA CURRIER; OFFICER
JAZMINA FLANAGAN; NURSE JANE
BALAO; NURSE BRIGIDO BAYAWA;
NURSE LEILANI FLORES; NURSE
ROSEMARY MCCRARY; NURSE MA
LITA SASTRILLO; NURSE CHRIS
SHIELDS; DOES I through X; and ROE
ENTITIES I through X, inclusive,

Defendants.

Case No. 2:21-cv-01161-ART-NJK

ORDER

This case arises out of the tragic death of Melody Morgan (“Morgan”), who died by suicide on April 28, 2018, after hanging herself at Florence McClure Women’s Correctional Center (“Florence McClure”). Plaintiff Bonnie Lopez (“Lopez”) is the special administrator for Morgan’s estate and is also Morgan’s sister. Plaintiff Colleen Lackey (“Lackey”) is Morgan and Lopez’s mother. She brings this action in her own capacity as the mother and as an heir to the decedent. Plaintiffs’ First Amended Complaint (“FAC”) alleges the following causes of action: (1) 42 U.S.C. § 1983 (Eighth Amendment – Deliberate Indifference to Serious Medical Need); (2) 42 U.S.C. § 1983 (Fourteenth Amendment – Loss of Familial Association); (3) Negligence; (4) Wrongful Death; (5) Gross Negligence; (6)

1 Neglect of Vulnerable Person; (7) Negligent Hiring, Training and Supervision; and
2 (8) Professional Negligence. (ECF No. 1-2.)

3 Before the Court is Defendants Gary Piccinini, Bryan Shields, Dwight
4 Neven, Nevada Department of Corrections, Jane Balao, Christopher Shields, and
5 Rosemarie McCrary's Motion for Summary Judgment (ECF No. 74.)

6 **I. BACKGROUND**

7 Plaintiffs allege the following. Decedent Melody Morgan was diagnosed with
8 bipolar disorder, schizophrenia, and multiple personality disorder, and she had
9 approximately three psychiatric hospitalizations. (ECF No. 1-2 at ¶ 31.) Morgan
10 also "had a history of suicidal ideations" and had attempted suicide multiple
11 times since age fourteen. (*Id.* at ¶ 32.) In December 2012, Morgan was arrested
12 and detained for various criminal charges. While detained, she was placed on
13 suicide watch for suicidal ideation. On December 21, 2012, she attempted suicide
14 and was placed on suicide watch. (*Id.* at ¶¶ 33-34.)

15 In 2013, Morgan pleaded guilty to a felony and was incarcerated at Florence
16 McClure in Las Vegas, Nevada. (*Id.* at ¶36.) Upon admittance at Florence
17 McClure, Morgan's Presentence Investigation Report, Nevada Department of
18 Corrections Transport Form, and other intake forms identified her mental health
19 issues and suicidal ideations. (ECF No. 117-1 at 2; ECF No. 117-2 at 2-4.)
20 Subsequent evaluations at Florence McClure further documented these mental
21 disorders and suicidal tendencies. (ECF No. 117-3 at 3-4.) Morgan was later
22 transferred to the Jean Conservation Camp, a minimum-custody camp in Nevada
23 for female offenders. (ECF No. 1-2 at ¶ 38.) On April 19, 2018, Morgan and
24 another incarcerated individual escaped from the Jean Conservation Camp. (*Id.*
25 at ¶ 39.) Law enforcement apprehended Morgan on April 26, 2018, after her
26 mother, Lackey, reported her location. (*Id.* at ¶¶ 44-45.) Before law enforcement
27 apprehended Morgan, Lackey told Defendant Inspector Bryan Shields that
28 Morgan had a history of mental illness and suicide attempts and requested

1 officials put Morgan on suicide watch because of the risk she would hurt herself
2 if re-captured, especially if she discovered her mother's role in her
3 reincarceration. (*Id.* at ¶¶ 40–42.; ECF No. 118-6 at 6-7; ECF No. 118-3 at 14-
4 15.) Inspector Shields relayed Lackey's concern to Defendant Lieutenant Karissa
5 Currier at Florence McClure. (ECF No. 1-2 at ¶ 13; ¶ 48.)

6 Lieutenant Currier and Officer Flanigan dispute what happened after this
7 phone call. According to Lieutenant Currier, on April 26, 2018, she called Officer
8 Flanigan to convey Lackey's concerns to medical staff and have Morgan placed
9 on suicide watch. (ECF No. 118-8 at 4-5.) Lieutenant Currier claims that she
10 ordered Officer Flanigan to inform the medical staff at Florence McClure of
11 Lackey's concern, but Officer Flanigan denies that Lieutenant Currier gave her
12 that command. (ECF No. 1-2 at ¶ 14; ¶¶ 49–50.) Officer Flanigan testified that if
13 she had received such a call, she would have written it down in her notes, added
14 the information to a shift log entry on her computer, asked follow up questions,
15 and notified medical staff. (ECF No. 118-9 at 11-12.) Officer Flanigan stated that
16 she checked her personal notes and shift log and neither documented the April
17 26 call; however, she did not keep her personal notes. (ECF No. 115-9 at 17.)
18 Lieutenant Currier did not document the call in a shift log either, although she
19 stated in her deposition that shift command does not do shift logs. (ECF No. 115-
20 8 at 10.)

21 Following Morgan's apprehension, law enforcement took Morgan to
22 Florence McClure on April 26, 2018. (ECF No. 1-2 at ¶ 51.) Morgan was informed
23 that her mother had assisted in locating her. (*Id.* at ¶ 46.) Morgan was housed
24 alone in a cell without any suicide precautions. (*Id.* at 25.) The Florence McClure
25 medical staff did not receive any messages regarding Lackey's concerns nor
26 conduct a psychological or psychiatric evaluation of Morgan. (*Id.* at ¶ 56.) Nurse
27 Bayawa claims that if medical staff had received information concerning Morgan's
28 high suicide risk, then Morgan may have been placed in a suicide room, which is

1 a stripped cell with a camera, suicide blanket, and check ins every 15 minutes.
2 (ECF No. 115-11 at 4-6.) Two days later, on April 28, 2018, Morgan hanged
3 herself in her cell at Florence McClure. (*Id.* at ¶ 56; 58.)

4 Various FMWCC correctional officers and nursing staff, including
5 Defendants Balao, Bayawa, Flores, McCrary, Sastrillo, and Chris Shields,
6 responded when Morgan was discovered hanging by a noose made of bed sheets.
7 The nursing staff attempted to resuscitate Morgan. However, compressions were
8 ineffective, and the nurses did not appropriately position and open Morgan's
9 airways as required by Basic Life Support algorithms until approximately six
10 minutes into the process in part due to the lack of necessary equipment (oxygen
11 mask) and lack of appropriate utilization of the equipment (hook up to oxygen
12 tank). (*Id.* at 2.) The ambulance was delayed in the Sally Port upon arrival to the
13 prison and leaving. (*Id.*) The nursing staff admitted they failed to give breaths
14 during the first five minutes of CPR consistent with their training and to properly
15 connect the AMBU bag. (ECF Nos. 112-10 at 108:10-108:25; 112-17 at 51; 112-
16 18 at 52:15-52:22.)

17 Prison officials later investigated the events. Warden Neven oversees
18 developing and applying policy and procedures in accordance with the Nevada
19 Administrative Code and NRS. (ECF No. 114-6 at 18:2-18:6.) During his
20 deposition, Warden Neven "could not recall whether [he] had an operating
21 procedure or not" for suicide prevention or intervention. (*Id.* at 27:06-27:10.) He
22 also did not believe that correctional officers received any training on assessing
23 inmate suicide risk. (*Id.* at 27:24-28:02.) In addition, when asked about
24 procedures for handling outside calls expressing a concern that an inmate was
25 suicidal, Warden Neven could not recall the procedures being in any written
26 operational procedure or administrative regulation. (*Id.* at 33:23-34:16.)
27 According to Warden Neven's review, "there were some system failures involving
28 the inmate intake process," including "the failure of medical staff to follow intake

1 administrative regulations and FNWCC operational procedures.” (*Id.* at 104:03-
2 104:14.) Warden Neven requested an investigation into the conduct of nurses
3 Leilani Flores and Ma Lita Sastrillo regarding allegations of insubordination and
4 neglect of duty, but he did not request any follow up investigation into the
5 miscommunication between Lieutenant Currier and Officer Flanigan. (*Id.* at
6 103:05-103:15.) Associate Warden Piccinini testified that Lieutenant Currier did
7 not originally mention any conversations regarding Morgan in her report;
8 Associate Warden Piccinini similarly did not mention in his report that Lieutenant
9 Currier informed him that she received a phone call from Investigator Shields
10 about Lackey’s concerns regarding Morgan. (ECF No. 112-19 at 98:09-98:16;
11 108:21-109:03.) Plaintiffs’ former attorney had sent Associate Warden Piccinini a
12 letter on May 11, 2018, instructing him to preserve any documents related to
13 Morgan, yet he admitted he did not preserve text messages from April 28, 2018,
14 regarding Mogan and notes he wrote prior to drafting his report. (*Id.* at 133:04-
15 134:24.)

16 **III. LEGAL STANDARD**

17 The Federal Rules of Civil Procedure provide for summary adjudication
18 when the pleadings, depositions, answers to interrogatories, and admissions on
19 file, together with the affidavits, if any, show that “there is no genuine dispute as
20 to any material fact and the movant is entitled to judgment as a matter of law.”
21 Fed. R. Civ. P. 56(a). A party asserting or disputing a fact “must support the
22 assertion by ... citing to particular parts of materials in the record, including
23 depositions, documents, electronically stored information, affidavits or
24 declarations, stipulations (including those made for purposes of the motion only),
25 admissions, interrogatory answers, or other materials.” Fed. R. Civ. P. 56(c)(1)(A).
26 Material facts are those that may affect the outcome of the case. *See Anderson v.*
27 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is
28 genuine if there is a sufficient evidentiary basis on which a reasonable fact-finder

1 could rely to find for the nonmoving party. *Id.*

2 In determining summary judgment, courts apply a burden-shifting
3 analysis. A party seeking summary judgment bears the initial burden of
4 demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v.*
5 *Catrett*, 477 U.S. 317, 323 (1986). When the nonmovant bears the burden at trial,
6 as is the case here, the movant can meet its burden by either (1) presenting
7 evidence to negate an essential element of the nonparty's case; or (2) by
8 demonstrating that the non-moving party failed to make a showing sufficient to
9 establish an element essential to that party's case. See *id.* at 323-24. After the
10 movant has met its burden, the burden shifts to the nonmovant to come forward
11 with specific facts showing a genuine issue of material fact remains for trial.
12 *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

13 Although "[o]n summary judgment the inferences to be drawn from the
14 underlying facts...must be viewed in the light most favorable to the party
15 opposing the motion," *id.* (quoting *United States v. Diebold, Inc.*, 369 U.S. 654,
16 655 (1962)), the non-movant "must do more than simply show that there is some
17 metaphysical doubt as to the material facts." *Id.* at 586-87 (internal citations
18 omitted). "The mere existence of a scintilla of evidence in support of the plaintiff's
19 position will be insufficient." *Anderson*, 477 U.S. 242 at 252. In other words, the
20 non-moving party cannot avoid summary judgment by "relying solely on
21 conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d
22 1040, 1045 (9th Cir. 1989) (citing *Angel v. Seattle-First nat. Bank*, 653 F.2d 1293,
23 1299 (9th Cir. 1981)). Instead, to survive summary judgment, the opposition
24 must go beyond the assertions and allegations of the pleadings and set forth
25 specific facts by producing admissible evidence that shows a genuine issue for
26 trial. See *Celotex Corp.*, 477 U.S. 317 at 324.

27 If the moving party presents evidence that would call for judgment as a
28 matter of law at trial if left uncontroverted, then the respondent must show by

specific facts the existence of a genuine issue for trial. *Anderson*, 477 U.S. 242 at 250. “If, as to any given material fact, evidence produced by the moving party... conflicts with evidence produced by the nonmoving party . . . we must assume the truth of the evidence set forth by the nonmoving party with respect to that material fact.” *Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th Cir. 2013). If reasonable minds could differ on material facts, summary judgment is inappropriate because summary judgment’s purpose is to avoid unnecessary trials only when the material facts are undisputed; if not, the case must proceed to the trier of fact. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995) (citing *Lindahl v. Air France*, 930 F.2d 1434, 1436 (9th Cir. 1991)).

IV. ANALYSIS

A. CLAIMS AGAINST BRYAN SHIELDS

In their response to the present motion, Plaintiffs stated they “do not oppose the dismissal of Mr. Bryan Shields.” (ECF No. 112 at 2 n.2). Thus, the Court will dismiss all claims against Defendant Inspector Shields.

B. EIGHTH AMENDMENT CLAIMS

The Court must determine whether Defendants potentially violated the Eighth Amendment. Prison officials violate the Eighth Amendment's cruel and unusual punishments clause when they are “deliberately indifferent” to a prisoner's “serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 102–05 (1976). Such a violation “may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison officials provide medical care.” *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988) (citing *Estelle*, 429 U.S. at 105); *see also Stewart v. Aranas*, 32 F.4th 1192, 1195 (9th Cir. 2022) (requiring a prisoner to demonstrate that any alleged delay in medical care led to further injury).

A claim for deliberate indifference to serious medical needs can be asserted by a pretrial detainee or a prisoner. *Horton by Horton v. City of Santa Maria*, 915

1 F.3d 592, 599 (9th Cir. 2019) (discussing standards for deliberate indifference).
2 A pretrial detainee's claim deliberate indifference is brought as a Due Process
3 violation under the Fourteenth Amendment, while a prisoner's similar claim is a
4 violation of the Eighth Amendment. *Id.* As explained in *Horton*, while the elements
5 of both claims are the same, they differ in the required showing of deliberate
6 indifference. *Id.* at 602. To show deliberate indifference, the plaintiff must provide
7 evidence of two things: (1) "a serious medical need by demonstrating that failure
8 to treat a prisoner's condition could result in further significant injury or the
9 unnecessary and wanton infliction of pain"; and (2) "the defendant's response to
10 the need was deliberately indifferent." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th
11 Cir. 2006) (internal citations and quotations omitted).

12 The Ninth Circuit differentiated these claims in *Gordon* in 2018 when it
13 held that a pretrial detainee's Fourteenth Amendment claim for deliberate
14 indifference is analyzed under a "purely objective standard." *Horton*, 915 F.3d at
15 602 (citing *Gordon v. County of Orange*, 888 F.3d 1118, 1125-26 (9th Cir. 2018)).
16 Under *Gordon*, to prove deliberate indifference a pretrial detainee must show that
17 there was "a substantial risk of serious harm to the plaintiff that could have been
18 eliminated through reasonable and available measures that the officer did not
19 take, thus causing injury that the plaintiff suffered." *Id.* (quoting standard from
20 *Castro*, 833 F.3d at 1068-71, that was adopted in *Gordon*, 888 F.3d at 1125-26).
21 In contrast, a prisoner's claim for deliberate indifference under the Eighth
22 Amendment is analyzed under a partially *subjective* standard that requires a
23 plaintiff to show "an objective risk of harm and a subjective awareness of that
24 harm." *Id.* at 600, citing *Conn v. City of Reno*, 591 F.3d 1081, 1095 (9th Cir. 2010),
25 vacated, 563 U.S. 915 (2011), opinion reinstated in relevant part, 658 F.3d 897
26 (9th Cir. 2011) (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

27 Because the serious medical need here involved risk of suicide, the Ninth
28 Circuit's holdings in *Conn* and *Clouthier v. County of Contra Costa*, 591 F.3d 1232,

1241-43 (9th Cir. 2010) are particularly relevant. *See Conn*, 591 F.3d at 1105 (reversing summary judgment in favor of officers who failed to report risk of detainee’s suicide attempt and threats); *Clouthier*, 591 F.3d at 1254 (reversing summary judgment in favor of mental health worker who removed suicide prevention measures). Although *Conn* and *Clouthier* each concerned pretrial detainees, both cases were decided before *Gordon*, so the court analyzed the claims under the then-current Eighth Amendment test. *Horton*, 915 F.3d 592 (citing *Conn*, 591 F.3d at 1095). To show deliberate indifference in *Conn*, the plaintiff was required to show “an objective risk of harm and a subjective awareness of that harm.” *Horton*, 915 F.3d 592 (citing *Conn*, 591 F.3d at 1095). Because Morgan was a prisoner, the claims here are governed by the Eighth Amendment standard, which is the same standard applied in *Conn* and *Clouthier*.

1. SERIOUS MEDICAL NEED

The Ninth Circuit has held that “[a] heightened suicide risk or an attempted suicide is a serious medical need.” *Conn*, 591 F.3d at 1095 (citing, inter alia, *Doty v. County of Lassen*, 37 F.3d 540, 546 (9th Cir. 1994)). “The requirements for mental health care are the same as those for physical health care needs.” *Doty* 37 F.3d at 546. While *Conn* involved Fourteenth Amendment Due Process claims brought on behalf of a pretrial detainee, the “serious medical need” analysis is the same for prisoner Eighth Amendment claims. *Id.* Here, Defendants agree that a manifest suicide risk is a serious medical need. (ECF No. 84 at 19.)

2. INDIFFERENCE TO THAT NEED

To prove deliberate indifference under the Eighth Amendment, Plaintiffs must meet a “‘subjective deliberate indifference’ standard.” *Sandoval v. County of San Diego*, 985 F.3d 657, 667 (9th Cir. 2021) (internal citations omitted). This requires Plaintiffs to show that Defendants were “(a) *subjectively aware* of the serious medical need and (b) failed to adequately respond.” *Conn*, 591 F.3d 1081 at 1096 (internal citations omitted) (emphasis in original). To fulfill the subjective

1 requirement for deliberate indifference, Plaintiffs “must demonstrate that the risk
2 was obvious or provide other circumstantial or direct evidence that the prison
3 officials were aware of the substantial risk to [the defendants]’ safety. *Lemire*, 726
4 F.3d at 1078 (citing *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010)). “[A]
5 factfinder may conclude that a prison official knew of a substantial risk from the
6 very fact that the risk was obvious.” *Id.* (quoting *Farmer*, 511 U.S. at 842).
7 Plaintiffs must also show “that there was no reasonable justification for exposing
8 the inmates to the risk.” *Id.* (citing *Thomas*, 611 F.3d at 1150). “A prison official’s
9 justification for exposing inmates to a substantial risk of harm is reasonable only
10 if it represents a proportionate response to the penological circumstances in light
11 of the severity of the risk to which the inmates are exposed.” *Id.* at 1079 (citing
12 *Thomas*, 611 F.3d at 154-55). Supervisors can be held liable under § 1983
13 through culpable action or inaction. The Ninth Circuit has recognized that “the
14 supervisor need not be ‘directly and personally involved in the same way as are
15 the individual officers who are on the scene inflicting the constitutional injury.’”
16 *Starr v. Baca*, 652 F.3d 1202, 1205 (9th Cir. 2011) (quoting *Larez v. City of Los*
17 *Angeles*, 946 F.2d 630, 645 (9th Cir. 1991)). “Rather, the supervisor’s
18 participation could include his ‘own culpable action or inaction in the training,
19 supervision, or control of his subordinates,’ ‘his acquiescence in the
20 constitutional deprivations of which the complaint is made,’ or ‘conduct that
21 showed a reckless or callous indifference to the rights of others.’” *Id.* (quoting
22 *Larez*, 946 F.2d at 646).

23 **a. Warden Dwight Neven and Associate Warden Gary**
24 **Piccinini**

25 Plaintiffs seek to hold Warden Neven and Associate Warden Piccinini liable
26 based on their roles in developing operating procedures and ensuring staff are
27 properly trained. Warden Neven was responsible for the “administrative
28 application of departmental policy, development of operational procedures, and

1 the enforcement of Nevada Administrative Code and NRS as dictated by
2 administrative regulations.” (ECF No. 114-6 at 18:02-18:06.) He had discretion
3 in creating operating procedures for the prison. (*Id.* at 20:16-20:20.) During his
4 deposition, Warden Neven could not recall any FMWCC operating procedure
5 related to suicide prevention or intervention. (*Id.* at 27:06-27:10.) While he agreed
6 that a variety of factors could be helpful in assessing inmate suicide risk,
7 including comments by the inmate during arrest, transport, or screening, officers’
8 observations of unusual inmate behavior, screenings conducted by medical
9 health professionals, inmate medical history, and comments from family
10 members, none of these factors were listed in any medical directive or
11 administrative regulation. (*Id.* at 59:01-61:12.) After Morgan’s death, FMWCC
12 changed its policy so that all new arriving inmates received complete intakes,
13 everyone knew their expectations, and all responders received further training.
14 (*Id.* at 64:15-64:23; 66:01-66:08.) Plaintiffs allege these facts demonstrate “an
15 obvious lack of training before April 28, 2018” and “no guidance as to sufficient
16 suicide prevention policies. (ECF No. 112 at 13-14.)

17 The Court finds Plaintiffs’ allegations sufficient to raise a genuine issue of
18 material fact as to whether Warden Neven failed to adequately respond to
19 Morgan’s known suicide risk. A supervisor can be held liable under the Eighth
20 Amendment for “his ‘own culpable action or inaction in the training, supervision,
21 or control of his subordinates.’” *Starr*, 652 F.3d at 1205 (quoting *Larez*, 946 F.2d
22 at 646). A reasonable jury could find that Warden Neven alleged failure to develop
23 appropriate suicide prevention policies and demonstrated deliberate indifference
24 to all inmates with serious suicidal ideations.

25 A reasonable jury could similarly find that Associate Warden Piccinini was
26 deliberately indifferent to Morgan’s serious medical needs. Associate Warden
27 Piccinini admitted that he is responsible for responding to “serious incidents.”
28 (ECF No. 112-19 at 49:16-49:19.) Associate Warden Piccinini did not believe that

1 he ever had the lieutenants train staff on suicide prevention and intervention. (*Id.*
2 at 36:02-36:06.) He also did not remember if he ever drafted any operating
3 procedures informing correction officers how to deal with suicide prevention and
4 intervention. (*Id.* at 36:07-36:11.) Associate Warden Piccinini did not believe there
5 was any training instructing staff to contact their supervisor if they were
6 concerned an inmate had suicidal tendencies. (*Id.* at 38:01-38:06.) Associate
7 Warden Piccinini was aware that Lieutenant Currier's original report did not
8 include any of her August 26, 2018 conversations about Morgan, and yet he
9 expressed that he was "not concerned" that Lieutenant Currier added this to her
10 report over a week later. (*Id.* at 108:21-109:19.) Associate Warden Piccinini did
11 not include in his report the fact that Lieutenant Currier informed him about
12 Inspector Shield's call. (*Id.* at 98:09-98:16.) Furthermore, Plaintiffs' former
13 attorney had sent Associate Warden Piccinini a letter on May 11, 2018,
14 instructing him to preserve any documents related to Morgan, yet he admitted he
15 failed to preserve text messages from April 28, 2018, regarding Morgan and notes
16 he wrote prior to drafting his report. (*Id.* at 133:04-134:24.) Based on this
17 information, a reasonable jury could conclude that Associate Warden Piccinini
18 was deliberately indifferent to Morgan's serious risk of suicide.

19 While Warden Neven and Associate Warden Piccinini argue that "Plaintiffs
20 cannot prove that either gentleman was aware of the facts from which the
21 inference could be drawn that Morgan was at a substantial risk of serious harm,"
22 this misstates the legal standard. They did not need to know any facts
23 demonstrating Morgan specifically was in substantial danger of suicide; instead,
24 they simply needed to know their actions or inactions "would pose a substantial
25 risk of serious harm to someone in [Morgan's] situation, not simply whether they
26 were subjectively aware of [Morgan's] specific medical needs." *Lemire v. Cal. Dep't*
27 *of Corr. & Rehab*, 726 F.3d 1062, 1078-79 (9th Cir. 2013) (citing *Gibson v. Cty. of*
28 *Washoe*, 290 F.3d 1175, 1191 (9th Cir. 2002), *overruled on other grounds by*

1 *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1076 (9th Cir. 2016)). Because a
 2 lack of training and policies concerning suicide prevention and intervention could
 3 pose such a substantial risk to a suicidal inmate, the Court finds Defendants’
 4 argument unpersuasive.

5 **b. Jane Balao, Christopher Shields, Rosemarie McCrary,**
 6 **and Brigado Bayawa¹**

7 The Court next considers whether Nurses Jane Balao, Christopher Shields,
 8 Rosemarie McCrary, and Brigado Bayawa were deliberately indifferent to
 9 Morgan’s serious risk of suicide. Defendants claim that none of these individuals
 10 (besides Bayawa) were on intake duty when Morgan arrived at FMCC nor had any
 11 training or responsibility for conducting evaluations of inmates’ mental states.
 12 (ECF No. 74 at 12.) Furthermore, Defendants argue that they immediately
 13 rendered emergency medical care after Morgan committed suicide. (*Id.*; ECF No.
 14 84 at 30.) However, Plaintiffs allege that the nurses were deliberately indifferent
 15 when they provided subpar medical treatment when Morgan was found hanging
 16 in her cell. (ECF No. 112 at 16-17.) In support of this claim, Plaintiffs rely on the
 17 nurses’ depositions in which they admit to providing subpar CPR. Specifically,
 18 Plaintiffs cite to the nurses’ testimony that they failed to provide breaths during
 19 CPR as instructed in training (ECF Nos. 112-10 at 108:17-108:25; 112-17 at
 20 51:8-51:17; 112-18 at 52:15-52:22.)

21 The Court concludes that a reasonable jury could find the nurses
 22 deliberately indifferent to Morgan when they provided subpar medical treatment.
 23 The Ninth Circuit, along with many other circuits, has held that “failing to provide
 24 CPR or other life-saving measures to an inmate in obvious need can provide the
 25 basis for liability under § 1983 for deliberate indifference.” *Lemire*, 726 F.3d at
 26 1082 (internal citations omitted). While the Ninth Circuit has refused to find

27
 28 ¹ Nurse Bayawa was represented by different counsel than those representing the other nurses.
 This order discusses all of the nurses together because they face liability for the same events.

officers deliberately indifferent for failing to provide CPR when their behavior “was not deficient,”² here Defendants admit their medical treatment was subpar and inconsistent with their medical training. (ECF Nos. 112-10 at 108:17-108:25; 112-17 at 51:8-51:17; 112-18 at 52:15-52:22.) In addition, the Ninth Circuit has found trained medical professionals deliberately indifferent when they failed to follow “[s]tandard nursing protocol” and acted contrary to how “every reasonable nurse” would in the situation. *Sandoval*, 985 F.3d at 679. Thus, the nurses’ failure to provide CPR in line with medical training and standard protocol may constitute deliberate indifference.

3. CAUSATION

The Court next considers whether the alleged deliberate indifference was both an actual and a proximate cause of Plaintiffs’ harm. *Castro*, 797 F.3d at 667 (citing *Lemire*, 726 F.3d at 1074). This causation analysis applies to both Eighth and Fourteenth Amendment claims. *See Gordon*, 888 F.3d at 1125 (describing the requirements for a pretrial detainee’s Fourteenth Amendment medical care claim, including a causation requirement); *Lemire*, 726 F.3d at 1074 (citing *Conn*, 591 F.3d at 1098-01) (explaining that Eighth Amendment deliberate indifference claims require a showing of both actual and proximate cause). “[P]laintiffs who have already demonstrated a triable issue of fact as to whether prison officials exposed them to a substantial risk of harm, and who actually suffered precisely [that foreseeable harm], will also typically be able to demonstrate a triable issue of fact as to causation.” *Lemire*, 726 F.3d at 1080-81 (citing *Conn*, 591 F.3d at 1098-1101; *White*, 901 F.2d 1501, 1505 (9th Cir. 1990)). Conduct is an actual cause of injury “only if the injury would not have occurred ‘but for’ that conduct.” *White*, 901 F.2d at 1505 (internal citations omitted). Actual or “but-for” causation is “purely a question of fact.” *Robinson v. York*, 566 F.3d 817, 825 (9th Cir. 2009).

² *Lemire*, 726 F.3d at 1083 (discussing the Ninth Circuit’s refusal to find officers deliberately indifferent in *Cartwright v. City of Concord*, 856 F.2d 1437, 1438 (9th Cir. 1988) and *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1415 (9th Cir. 1986)).

“Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for the injury”—in other words, whether the defendant's actions were a proximate cause. *White*, 901 F.2d at 1506. While a defendant “is not the proximate cause of [the plaintiff]’s alleged injuries if another cause intervenes and supersedes their liability for the subsequent events[,] . . . foreseeable intervening causes . . . will not supersede the defendant's responsibility.” *Conn*, 591 F.3d at 1101 (quoting *White*, 901 F.2d at 1506). “If reasonable persons could differ’ on the question of causation then ‘summary judgment is inappropriate and the question should be left to a jury.’” *Lemire v. Cal. Dep’t of Corr. & Rehab.*, 726 F.3d 1062, 1080 (9th Cir. 2013) (quoting *White*, 901 F.2d at 1506).

a. Warden Dwight Neven and Associate Warden Gary Piccinini

The question of causation as to Defendants Neven and Piccinini should be left to the jury. As in *Conn*, the Court is “satisfied . . . that [Plaintiffs] presented sufficient evidence of actual and proximate causation to defeat summary judgment and give rise to a jury question whether [Warden Neven and Associate Warden Piccinini] caused [Morgan’s] eventual suicide.” *Conn*, 591 F.3d at 1098. Regarding actual cause, construing all the evidence in the light most favorable to Plaintiffs, the Court finds that a reasonable jury could conclude that if the wardens had developed procedures and training related to suicide prevention, then Morgan’s suicide could have been prevented.

As for proximate cause, the Court finds that Plaintiffs have “presented sufficient evidence of foreseeability that the question of proximate cause must be decided by a jury.” *Id.* at 1102. A reasonable jury could conclude that Morgan’s suicide was a “foreseeable and normal result” of the wardens’ lack of suicide prevention measures and training. *See White*, 901 F.2d at 1506.

1 In sum, the Court finds Plaintiffs’ allegations sufficient to show genuine
 2 issues of material facts as to whether the wardens were deliberately indifferent to
 3 Morgan’s heightened risk of suicide in violation of the Eighth Amendment.

4 **b. Jane Balao, Christopher Shields, Rosemarie McCrary,**
 5 **and Brigado Bayawa**

6 The Court similarly finds that a jury should decide the issue of causation
 7 with regards to the Nurse Defendants. A reasonable jury could find that the
 8 nurses were the actual cause of Morgan’s death because she might not have died
 9 but for their failure to provide CPR in line with their training. Turning to
 10 proximate cause, a reasonable jury could conclude that Morgan’s death was a
 11 “foreseeable and normal result” of the nurses’ failure to provide appropriate CPR.
 12 See, e.g., *Lemire*, 726 F.3d at 1083 (reversing the district court’s grant of
 13 summary judgment to officers who failed to provide CPR to inmate who
 14 committed suicide).

15 **C. FOURTEENTH AMENDMENT CLAIMS**

16 The Court turns to Plaintiffs’ Fourteenth Amendment claims for
 17 impermissible interference with familial association against Warden Neven,
 18 Associate Warden Piccinini, Nurse Balao, Nurse McCrary, and Nurse Shields.
 19 “Parents and children may assert Fourteenth Amendment substantive due
 20 process claims if they are deprived of their liberty interest in the companionship
 21 and society of their child or parent through official conduct.” *Lemire*, 726 F.3d at
 22 1075 (citing *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010)).

23 Officers violate the Fourteenth Amendment’s substantive due process
 24 protections when their “conduct ‘shocks the conscience.’” *Nicholson v. City of Los*
 25 *Angeles*, 935 F.3d 685, 692-93 (9th Cir. 2019) (quoting *Wilkinson*, 610 F.3d at
 26 554). To determine whether the conduct shocks the conscience, the “critical
 27 consideration [is] whether the circumstances are such that actual deliberation is
 28 practical.” *Nicholson*, 935 F.3d at 692-93 (quoting *Porter v. Osborn*, 546 F.3d

1 1131, 1137 (9th Cir. 2008) (quoting *Moreland v. Las Vegas Metro. Police Dep't*,
2 159 F.3d 365, 372 (9th Cir. 1998)). If actual deliberation is practical, then “an
3 officer's ‘deliberate indifference’ may suffice to shock the conscience,” *id.* (quoting
4 *Wilkinson*, 610 F.3d at 554), and the plaintiff may prevail by showing that the
5 officer “disregarded a known or obvious consequence of his action.” *Id.* (quoting
6 *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 974 (9th Cir. 2011)). “The ‘deliberate-
7 indifference inquiry should go to the jury if any rational factfinder could find this
8 requisite mental state.” *Nicholson*, 935 F.3d at 693.

9 Courts have recognized that in certain situations, like high-speed police
10 chases, officers have no time to deliberate. As the court explained in *Nicholson*,
11 “[w]e have previously carved out a narrow situation—high-speed police car
12 chases—in which we have found, categorically, that an officer does not have time
13 to deliberate. *Id.* at 694 (citing *Bingue v. Prunchak*, 512 F.3d 1169, 1177 (9th Cir.
14 2008)). To claims involving a high-speed police chase, the court applies the
15 “intent to harm” standard, whereas in other situations the court may apply the
16 “deliberate indifference” standard depending on the circumstances. *Nicholson*,
17 935 F.3d at 694 (citing *Bingue*, 512 F.3d 1176) In holding that “the intent to
18 harm” standard “applies to all high-speed police chases,” the court reasoned that
19 such a rule best accounts for an officer's “repeated split-second decisions about
20 how best to apprehend the fleeing suspect in a manner that will minimize risk to
21 [the officer's] own safety and the safety of the general public.” *Id.* This is because
22 an officer chasing a fleeing suspect has “no time for reflection and precious little
23 time for deliberation concerning either the decision to join the chase in the first
24 place or the serial decisions about how best to pursue the suspect.” *Id.* The
25 “purpose to harm” standard has also been applied to law enforcement
26 confrontations with suspects that are life-threatening and “rapidly escalating” *Id.*
27 at 694-95 (discussing *Porter*, 546 F.3d at 1139 (police officers had not time to
28 deliberate when suspect was driving toward them, attempting to run them over)

1 and *Moreland v. Las Vegas Metropolitan Police Dept.*, 159 F.3d 365, 368 (9th Cir.
2 1998)(officers responding to active gunfight had no opportunity to deliberate in
3 light of the “immediate risk of serious harm or death to the many innocent
4 individuals trapped in the parking lot”).

5 The Court acknowledged in *Nicholson* that the deliberate indifference
6 standard, not the intent to harm standard, applies when there is no “rapidly
7 escalating” confrontation or “extreme emergency.” *Nicholson*, 935 F.3d at 694.
8 In *Nicholson*, the Court held that the deliberate indifference standard applied to
9 a situation in which two officers fired shots at four teenagers whom they
10 encountered in an alley. *Id.* at 694-95. The officers believed that they saw one of
11 the teenagers pointing a handgun at another. The first officer, Officer Gutierrez,
12 “immediately jumped out of the car and ran into the alley” without talking to the
13 other officer. *Id.* at 689. “A few seconds after he entered the alley, Officer Gutierrez
14 fired at least three shots, one of which hit [one of the minor bystanders] J.N.G.
15 in the back.” *Id.* Unlike a high-speed chase or escalating confrontation with a
16 suspect, this was a “minimal information” situation in which the officer must
17 take some time to assess the situation. *Id.* at 695.

18 Whether the officers had time to deliberate may be an issue for the fact
19 finder. In *Nicholson*, the Ninth Circuit agreed with the district court that “[a]
20 finder of fact could conclude...that Gutierrez disregarded the known or obvious
21 risks of injury to J.H. and J.N.G. when he fired at Sanders without taking time
22 to assess the situation.” *Id.* at 693. Because there was “a triable issue on whether
23 ‘deliberation was practical under the circumstances,’” the court refused to find
24 that the district court should have applied a “purpose to harm” standard. *Id.* at
25 694-95.

26 The Ninth Circuit has similarly applied the deliberate indifference standard
27 in cases in which “officers [had] ample time to correct their obviously mistaken
28 detention of the wrong individual, but nonetheless fail[ed] to do so[.]” *Porter*, 546

1 F.3d at 1139 (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 684 (9th Cir. 2001)).
2 The present case is more similar to these deliberate indifference cases because
3 the nurses likely could have corrected their subpar CPR well before six minutes
4 passed and they were not facing competing concerns in the moment.

5 While the Ninth Circuit has not directly addressed the proper standard to
6 apply in a case involving a prison suicide, the Supreme Court expressed support
7 for using the deliberate indifference standard for Fourteenth Amendment claims
8 involving pretrial detainees' medical needs. In *County of Sacramento v. Lewis*, the
9 Supreme Court, in a discussion of the "shock the conscience" standard, stated
10 that since deliberate indifference may suffice for Eighth Amendment prisoner
11 deliberate indifference to serious medical needs claims, "it follows that such
12 deliberately indifferent conduct must also be enough to satisfy the fault
13 requirement for due process claims based on the medical needs of someone jailed
14 while awaiting trial[.]" 523 U.S. at 850 (internal citations omitted). Later in the
15 case, the Court recognized "attention to the markedly different circumstances of
16 normal pretrial custody and high-speed law enforcement chases shows why
17 deliberate indifference that shocks in the one case is less egregious in the other[.]"
18 *Id.* at 851. Thus, the Supreme Court recognized that courts should evaluate
19 medical claims brought under the Fourteenth Amendment using a deliberate
20 indifference standard and viewed custodial cases as fundamentally different from
21 high-speed chases.

22 Furthermore, other circuits have applied the deliberate indifference
23 standard in Fourteenth Amendment prison suicide cases. For instance, in
24 *Bradich ex rel. Estate of Bradich v. City of Chicago*, the Seventh Circuit reversed
25 the district court's grant of summary judgment to officers who waited ten minutes
26 to request help after finding a detainee hanging in his cell. 413 F.3d 688, 691
27 (7th Cir. 2005). Even though one of the officers had CPR training, the officers
28 simply "shouted at, slapped, and shook Bradich in an attempt to restart his

breathing.” *Id.* The Court applied a deliberate indifference standard and found that summary judgment was inappropriate based on the factual record. *Id.* at 692. In both *Bradich* and the present case, officials with at least some of them having medical training took significant time to render appropriate medical care. *Bradich* provides persuasive authority that this Court should apply the deliberate indifference standard here, deny summary judgment, and leave further decisions to the jury.

Here the questions are whether a factfinder could conclude that the wardens had time to deliberate on whether to provide training and policies related to suicide prevention and whether the nurse defendants who responded to Morgan’s suicide had time to deliberate with respect to promptly attempting CPR without following proper procedures.

1. Warden Dwight Neven and Associate Warden Gary Piccinini

Summary judgment on the Fourteenth Amendment claim against Warden Neven and Associate Warden Piccinini is inappropriate because, as Defendants concede, “it could be argued [that they] had time to deliberate.” (ECF No. 74 at 14.) Both of these Defendants had time to deliberate whether to provide training and policies related to suicide prevention. Thus, Plaintiff must show these Defendants were deliberately indifferent to Morgan’s serious risk of suicide.

The wardens can still be held liable for violating the Fourteenth Amendment even if they lacked any personal knowledge of Morgan’s suicide risk. Defendants argue that the wardens “were not deliberately indifferent to a risk of harm to Morgan because none of them knew of and chose to ignore an excessive risk to Morgan.” (*Id.*) But the wardens needed to only know that their actions or inactions “would pose a substantial risk of serious harm to someone in [Morgan’s] situation, not simply whether they were subjectively aware of [Morgan’s] specific medical needs.” *Lemire*, 726 F.3d at 1077-78 (citing *Gibson v. Cty. of Washoe*, 290 F.3d 1175, 1191 (9th Cir. 2002), *overruled on other grounds by Castro v. Cty.*

1 of Los Angeles, 833 F.3d 1060, 1076 (9th Cir. 2016)). Because a reasonable jury
 2 could conclude that the wardens were aware that a lack of policies and training
 3 concerning suicide prevention could result in inmates committing suicide, the
 4 Court finds Defendants' argument unpersuasive.

5 As discussed in the Eighth Amendment section, since this Court finds
 6 Plaintiffs' allegations sufficient to raise a genuine issue of material fact
 7 concerning whether the wardens acted with deliberate indifference, the Court will
 8 not grant summary judgment on this basis. *See Lemire*, 726 F.3d at 1075 (citing
 9 *County of Sacramento v. Lewis*, 523 U.S. 833, 849-50 (1998) ("Just as the
 10 deliberate indifference of prison officials to the medical needs of prisoners may
 11 support Eighth Amendment liability, such indifference may also 'rise to the
 12 conscience-shocking level' required for a substantive due process violation."))

13 **2. Jane Balao, Christopher Shields, Rosemarie McCrary, and**
 14 **Brigado Bayawa**

15 The nurses are not entitled to summary judgment on the Fourteenth
 16 Amendment claims. In their motion for summary judgment, Defendants state
 17 that "[n]ot a single one of the Nurses' [sic] could be describes [sic] as having acted
 18 with a purpose to harm Morgan" because each one "sprung immediately into
 19 action to try to save her life." (ECF Nos. 74 at 14; 84 at 30.) In their response,
 20 Plaintiffs do not address Defendants' reference to the purpose to harm standard
 21 and instead incorporate their Eighth Amendment arguments in support of their
 22 claim that "[i]t is for the jury to decide if Defendants were deliberately indifferent
 23 when they performed substandard CPR." (ECF No. 112 at 17.) This Court finds
 24 that a reasonable jury could conclude that the nurses had time to deliberate
 25 during the six minutes they spent attempting CPR without following proper
 26 procedures. At minimum, there exists a factual issue as to whether deliberation
 27 was practical under the circumstances, so the Fourteenth Amendment claim
 28 should be resolved by the jury. *See Nicholson*, 935 F.3d at 694-95 (internal

1 citations omitted) (refusing to find that the district court should have applied a
 2 purpose to harm standard because there was “a triable issue on whether
 3 deliberation was practical under the circumstances”).

4 A reasonable jury may find that the nurses in the present case could have
 5 corrected their subpar CPR much sooner than six minutes after beginning to
 6 render care. Thus, the Court will deny the motion for summary judgment and
 7 allow a jury to hear the Fourteenth Amendment claim.

8 **D. STATE LAW CLAIMS**

9 **1. Causation**

10 Because this Court finds that a jury must resolve the question of actual
 11 and proximate cause, it would be inappropriate to grant Defendants’ requests for
 12 summary judgment on the state law claims. In their motions for summary
 13 judgment, Defendants argue that due to the intake nurses’ failure to conduct a
 14 mental health assessment, “[t]he lack of causation warrants summary judgment
 15 on the state law claims[.]” (ECF No. 74 at 18.) However, as discussed above, a
 16 jury could reasonably conclude the wardens’ and nurses’ conduct was both an
 17 actual and proximate cause of Morgan’s death.

18 **2. Negligence Claims Against Nurses**

19 Defendants argue that Plaintiffs’ negligence claims against the nurse
 20 defendants can only be brought as professional negligence claims, and thus the
 21 Court must dismiss Plaintiffs’ negligence, gross negligence, wrongful death, and
 22 neglect of a vulnerable person claims. (*Id.* at 19.) Because the Court agrees with
 23 the Defendants, the Court will dismiss these claims.

24 Nevada has specific laws addressing professional negligence. It defines
 25 professional negligence as “the failure of a provider of health care, in rendering
 26 services, to use the reasonable care, skill, or knowledge ordinarily used under
 27 similar circumstances by similarly trained and experienced providers of health
 28 care. NRS 41A.015 (2015). “Providers of health care” includes licensed nurses.

1 NRS 41A.017 (2019). Plaintiffs must include a supporting affidavit from a medical
2 expert when making professional negligence claims or else the district court must
3 dismiss the action without prejudice. NRS 41A.071 (2022).

4 Courts are empowered to determine if a claim sounds in ordinary or
5 professional negligence. “If the alleged breach involves ‘medical judgment,
6 diagnosis, or treatment,’ it is likely a claim for medical malpractice.” *Estate of*
7 *Curtis v. South Las Vegas Medical Investors, LLC.*, 466 P.3d 1263, 1267 (Nev.
8 2020) (quoting *Szymborski v. Spring Mountain Treatment Center*, 403 P.3d 1280,
9 1284 (Nev. 2017)). “Thus, ‘if the jury can only evaluate the plaintiff’s claim after
10 presentation of the standards of care by a medical expert, then it is a [professional
11 negligence] claim.’” *Id.* (quoting *Szymborski*, 403 P.3d at 642). “If, on the other
12 hand, the reasonableness of the healthcare provider’s actions can be evaluated
13 by jurors on the basis of their common knowledge and experience, then the claim
14 is likely based in ordinary negligence.” *Id.* (citing *Szymborski*, 403 P.3d at 642).
15 Because the distinction between professional and ordinary negligence can be
16 subtle, courts look to the “‘gravamen or substantial point or essence’” of each
17 claim to make the necessary determination. *Id.* (quoting *Szymborski*, 403 P.3d at
18 642-43).

19 In the narrow set of cases “where the negligence alleged involves a medical
20 diagnosis, judgment, or treatment but the jury is capable of evaluating the
21 reasonableness of the health care provider’s actions using common knowledge
22 and experience” the court may not require a medical affidavit. *Id.* at 1267. The
23 exception only applies in “rare situations” where the claim does not raise
24 “questions of medical judgment beyond the realm of common knowledge and
25 experience.” *Id.* (quoting *Bryant v. Oakpointe Village Nursing Ctr., Inc.*, 684 N.W.
26 2d 864, 871 (Mich. 2004)).

27 Because Plaintiffs concede that their state law claims sound in professional
28 negligence (ECF No. 112 at 26), the question is whether their ordinary negligence-

1 based claims must be dismissed. Plaintiffs argue that “the legal inquiry is not
2 whether other claims become subsumed into a professional negligence claim but
3 whether the affidavit requirement in NRS 41A.071 applies to those claims as
4 well.” (*Id.*) (emphasis in original). Plaintiffs cite as evidence *Schwarts v. Univ. Med.*
5 *Ctr. of S. Nevada*, 460 P.3d 25 (Nev. 2020) (unpublished) and *Yafchak v. S. Las*
6 *Vegas Med. Invs., LLC*, 138 Nev. Adv. Op. 70, 519 P.3d 37 (2022). In *Schwarts*,
7 the relevant claim was dismissed based on failure to file a required affidavit when
8 proving the civil conspiracy claim necessarily required showing professional
9 negligence. *Schwarts*, 460 P.3d at 25. In *Yafchak* the question was whether the
10 claims sounded in professional negligence. *See Yafchak*, 519 P.3d at 39. The
11 court in *Yafchak* reversed the district court’s order dismissal of Yafchak’s
12 complaint because it erred “in summarily concluding that LCC met its burden in
13 proving that Yafchak’s allegations sounded in professional negligence” and
14 remanded the case for further proceedings to develop the factual record to clarify
15 if the claims sounded in professional negligence or elder abuse. *Id.* at 39-41.

16 When, as here, it is undisputed that the claims sound in professional
17 negligence, it appears that ordinary negligence claims must be dismissed. *See*
18 *Estate of Cronin v. G4 Dental Enterprises, LLC*, 526 P.3d 1111 (Nev. App. 2023).
19 In *Estate of Cronin*, the Nevada Court of Appeals upheld the dismissal of
20 negligence claims that are actually rooted in professional negligence. *See* 526
21 P.3d at 1111 (“Their judgment at each stage of John's care raises questions
22 beyond what common knowledge and experience provide, so the allegations
23 related to John's treatment arise from medical negligence and were properly
24 dismissed as general negligence claims.”) Here Plaintiffs have failed to show why
25 this Court should allow Plaintiffs to proceed on their ordinary negligence claims
26 when they admit the claims sound in professional negligence. As such, the Court
27 will dismiss all of the negligence claims against the nurses except the professional
28 negligence claims.

3. Statute of Limitations

Defendants move for summary judgment on Plaintiffs' state law claims because they are time-barred. Under Nevada state law, "an action for injury or death against a provider of health care may not be commenced more than 3 years after the date of injury or 1 year after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first." NS 41A.097(2). A plaintiff "discovers his legal injury when he knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of his cause of action." *Massey v. Litton*, 669 P.2d 248, 252 (1983). "A person is put on 'inquiry notice' when he or she should have known of facts that 'would lead an ordinarily prudent person to investigate the matter further.'" *Winn v. Sunrise Hosp. & Medical Center*, 277 P.3d 458, 462 (Nev. 2012) (quoting *Black's Law Dictionary* 1165 (9th ed. 2009)). "[T]he appropriate accrual date for the statute of limitations is a question of law only if the facts are uncontroverted." *Id.* (quoting *Day v. Zube*, 922 P.2d 536, 539 (Nev. 1996)).

Parties dispute when Plaintiffs discovered or should have discovered the injury. Both parties agree that the date of the injury is when Morgan died, which was April 28, 2018, so under the three-year standard, the statute of limitations expired on April 28, 2021. (ECF Nos. 74 at 20; 112 at 21-22.) Defendants argue that Plaintiffs discovered the injury (Morgan's death) the same day that she died because "she blamed NDOC almost immediately for Morgan's death" and first retained legal counsel in May of 2018. (ECF No. 84 at 45.) Defendants cite to an unpublished Nevada Supreme Court case, *Valley Health Sys., LLC v. Eighth Jud. Dis. Ct.*, 497 P.3d 278 (Table) (Nev. 2021) (unpublished disposition) to support their argument that the one-year accrual period should apply "[b]ecause the evidence is irrefutable." (ECF No. 128 at 31.) Defendants also cite as evidence for Plaintiffs being on inquiry notice (1) text messages between Lackey and

Investigator Shields the day after Morgan's death where Lackey states that she knew Morgan was not placed on suicide watch and (2) a phone call where Inspector Shields told Lackey he had told corrections to inform the medical unit to place Morgan on suicide watch. (ECF Nos. 128-11 at 2-4; 128-12.) Plaintiffs counter that the facts of *Valley Health Sys., LLC* are inapplicable to the present case because they did not discover the Nurse Defendants failure to give Morgan a full intake until Defendants' disclosures on April 6, 2021. (ECF No. 109 at 36-38.) Thus, Plaintiffs claim that the one-year accrual period ended April 6, 2022 (one year after the disclosure of Defendant Nurses) and thus their claims were not barred until the end of the three-year accrual period on April 28, 2021. (*Id.* at 35-38.)

The Court finds Plaintiffs' claim is not time-barred. Plaintiffs filed their original complaint, which did not include Nurse Defendants, on April 28, 2020. (*Id.* at 36.) They discovered the Nurse Defendants' involvement only after Defendants' disclosure on April 6, 2021, and then filed claims against the Nurse Defendants that same month, on April 26, 2021.³ (*Id.*) Thus, Plaintiffs would have had no reason to investigate possible claims against the Medical Defendants or be on inquiry notice until after the disclosure alerted them to the improper intake. And, as Plaintiffs point out, they would not have been able to file any professional negligence claims against the Nurse Defendants prior to this "because the required expert affidavit would have been completely hypothetical." (ECF No. 109 at 38.)

The Nevada Supreme Court's decision in *Valley Health System, LLC* does not apply here. As an initial matter, unpublished Nevada Supreme Court decisions issued after January 1, 2016, only have persuasive value. Nev. R. App. P. 36(c)(3). In *Valley Health System, LLC*, the Nevada Supreme Court held that a

³ While Plaintiffs state that they filed the Amended Complaint on August 26, 2021, the document is dated August 27, 2021. (ECF No. 1-2 at 22.)

1 professional negligence was time barred because the real parties in interest were
2 at the latest on inquiry notice on the date that they filed a complaint with the
3 State Board of Nursing alleging the health care providers did not appropriately
4 monitor and care for the decedent, causing her death. *Valley Health Sys., LLC*,
5 497 P.3d at 278. The court in *Valley Health System, LLC* was able to identify an
6 accrual date as a matter of law because the date was “uncontroverted;” the fact
7 the plaintiffs were able to make a professional complaint clearly demonstrated
8 they were on inquiry notice to investigate further. *Winn*, 277 P.3d at 462 (quoting
9 *Day*, 922 P.2d at 539). In the present case, Plaintiffs had no reason to believe
10 they should investigate the Nurse Defendants’ actions until they received
11 Defendants’ disclosure indicating the Nurse Defendants did not conduct a full
12 intake. Thus, the Nevada Supreme Court’s decision in *Valley Health System, LLC*
13 does not control this Court’s holding.

14 Since the Court concludes that the statute of limitations expired on April
15 28, 2021, Plaintiffs’ professional negligence claim is not time-barred. Plaintiffs
16 filed their Amended Complaint on April 26, 2021, and thus their filing was timely.
17 (ECF No. 109 at 36.)

18 The Court finds Plaintiffs’ claim is not time-barred. Defendants cite to an
19 unpublished case, *Valley Health Sys., LLC v. Eighth Jud. Dist. Ct.* 497 P.3d 278
20 (Table) (Nev. 2021) (unpublished disposition) for the idea that the one-year statute
21 of limitations should apply because they were on inquiry notice as soon as
22 Morgan died. (ECF No. 74 at 20.) However, in that case, the court found that the
23 party was on notice by the date the special administrator for the estate filed a
24 complaint with the State Board of Nursing. *Valley Health Sys., LLC*, 497 P.3d at
25 *2. Plaintiffs differ from the party in *Valley Health* because they never filed a
26 professional complaint nor had any reason to believe the nurses specifically may
27 have played a role in Morgan’s death until discovery. (ECF No. 112 at 22-23.) If
28 Defendants’ theory prevailed, then Plaintiffs would have had to file a complaint

1 without any reason to believe the nurses were liable; furthermore, Plaintiffs would
2 have needed to rely on a completely hypothetical expert affidavit to comply with
3 Nevada's professional negligence statute. (*Id.*)

4 Plaintiffs did not discover Morgan's injury until discovery began. In *Winn*,
5 the court determined that Winn did not discover the injury when it originally
6 occurred because "it is unlikely that an ordinarily prudent person would begin
7 investigating whether a cause of action might exist on the same day as being
8 informed that his or her child's surgery had gone drastically wrong." 277 P.3d at
9 253. The Court determined, as a matter of law, Winn discovered the injury no
10 later than the date he received the medical records. *Id.*; see also *Heinrich v.*
11 *Ethicon, Inc.*, No. 2:20-cv-00166-CDS-VCF, 2023 WL 3963611 (D. Nev. May 4,
12 2023) (finding that the statute of limitations in a medical malpractice action did
13 not begin until the receipt of medical records suggesting negligence). Here,
14 Plaintiffs had no reason to suspect the nurses of any negligence until April 6,
15 2021, when they received discovery disclosures suggesting the nurses did not
16 follow procedures. (ECF No. 112 at 21.) Thus, Plaintiffs had until three years from
17 the date of injury, April 28, 2021, to file their complaint. Since Plaintiffs filed their
18 amended complaint on April 26, 2021, their state law claims are not time-barred.
19 (*Id.* at 21-22.)

20 **E. QUALIFIED IMMUNITY**

21 **1. Nurses Jane Balao, Christopher Shields, and Rosemarie** 22 **McCrary**

23 The parties further dispute whether Nurses Balao, Shields, and McCrary
24 waived qualified immunity by not raising it in their Motion for Summary
25 Judgment. (ECF Nos. 112 at 2 n.2; 136 at 4-5.) Plaintiffs filed a Motion to Strike
26 the Nurses' joinder motion (ECF No. 135) and their reply to their summary
27 judgment motion (ECF No. 136) because they did not timely file the joinder
28 motion and failed to raise any qualified immunity defense at the summary

1 judgment stage prior to their reply. (ECF No. 137 at 2-5.) Defendants counter the
2 Court can choose to consider, in its discretion, the qualified immunity argument.
3 (ECF No. 140 at 3-9.) After careful consideration, the Court will not allow the
4 Nurses to make any qualified immunity arguments at the summary judgment
5 stage.

6 It is well established that “arguments raised for the first time in a reply
7 brief are waived.” *Turtle Island Restoration Network v. U.S. Dept. of Commerce*,
8 672 F.3d 1160, 1166 n.8 (9th Cir. 2012). Because Defendants did not raise
9 qualified immunity as a grounds for summary judgment until their reply, the
10 Court finds they waived consideration of the defense at the summary judgment
11 stage.

12 While the Ninth Circuit has not ruled on this issue directly, several circuits
13 have recognized that defendants can waive qualified immunity if they fail to raise
14 it during summary judgment proceedings. *See Summer v. Kenton Cnty. Clerk’s*
15 *Office*, 604 F.3d 257, 269-70 (6th Cir. 2010) (refusing to address qualified
16 immunity on appeal when the defendant raised the defense in his answer but not
17 in his motion for summary judgment); *Narducci v. Moore*, 572 F.3d 313, 324-25
18 (7th Cir. 2009) (affirming the district court’s denial of summary judgment based
19 on qualified immunity because the defendants did not raise the defense in their
20 motion for summary judgment); *Angarita v. St. Louis Cty.*, 981 F.2d 1537, 1548
21 (8th Cir. 1992) (finding that appellants failed to preserve the issue of qualified
22 immunity when they pled it in their answers but never raised it in any pretrial
23 motion or during or after trial); *Thomas v. Wellenreuther*, No. 21-1400, 2022 WL
24 1026047 (2d Cir. April 6, 2022) (affirming denial of qualified immunity when the
25 defendant plead qualified immunity in his answer but did not move for summary
26 judgment on qualified immunity grounds). At least one district court within the
27 Ninth Circuit has taken the same approach. *See, e.g., Pullano v. No. 8170, CCDC*
28 *Guard*, No 2:10-cv-00335, 2013 WL 1758999, at *2 (holding that Defendants

1 waived their qualified immunity defense by not raising it during summary
2 judgment). In line with these decisions, the Court holds that Defendants' failure
3 to raise qualified immunity in their summary judgment motion precludes relief
4 on that ground.

5 **2. Nurse Brigado Bayawa**

6 Because Nurse Bayawa raised qualified immunity as an affirmative
7 defense, the Court must consider whether it applies. Qualified immunity shields
8 certain government officials from liability unless their conduct violates "clearly
9 established statutory or constitutional rights of which a reasonable person would
10 have known." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow v.*
11 *Fitzgerald*, 457 U.S. 800, 818 (1982)). The point of shielding officials from liability
12 except when they violate "clearly established" rights is to "ensure that before they
13 are subjected to suit, officers are on notice their conduct is unlawful." *Id.* (quoting
14 *Saucier v. Katz*, 533 U.S. 194, 206 (2001)). Nonetheless, officials who violate
15 statutory or constitutional rights knowingly or through plain incompetence are
16 not shielded from liability. *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (quoting
17 *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)). Thus, if "every 'reasonable official
18 would have understood that what he is doing violates that right,'" then the right
19 is clearly established, and qualified immunity does not provide a defense. *See al-*
20 *Kidd*, 563 U.S. at 741. For a constitutional or statutory right to be clearly
21 established, there does not need to be a factually indistinguishable case spelling
22 out liability, but existing precedent "must have placed the statutory or
23 constitutional question beyond debate." *Id.*

24 As an initial matter, the Court has already discussed earlier that there is a
25 genuine dispute of material fact as to whether the nurses violated Morgan's rights
26 by providing subpar CPR not in line with their training. Thus, qualified immunity
27 will not apply if the Court also finds that the right to adequate life-saving
28 measures is clearly established. The Court finds such a right is clearly

1 established. In *Lemire*, the Ninth Circuit held that “[a]s other circuits have held,
2 failing to provide CPR or other life-saving measures to an inmate in obvious need
3 can provide the basis for liability under § 1983 for deliberate indifference.” 726
4 F.3d at 1082 (internal citations omitted). The Ninth Circuit found that a trier of
5 fact could conclude “officers trained to administer CPR who nonetheless did not
6 do so despite an obvious need demonstrated the deliberate indifference required
7 for an Eighth Amendment claim.” *Id.* at 1083. While the nurses here provided
8 CPR, they admitted that they did not follow their training or protocol when doing
9 so, leading Morgan not to receive proper CPR for six minutes. (ECF Nos. 112-10
10 at 108:17-108:25; 112-17 at 51:8-51:17; 112-18 at 52:15-52:22.) A reasonable
11 factfinder could decide that these subpar efforts were little different than doing
12 nothing at all and that the nurses understood Morgan had a right to CPR efforts
13 guided by medical knowledge and training. Thus, the Court will also deny Nurse
14 Bayawa qualified immunity.

15 **IV. CONCLUSION**

16 It is therefore ordered that Defendants’ Motion for Summary Judgment
17 (ECF No. 74) is denied.

18 It is further ordered that the Nurses’ Motion to Strike ECF Nos. 135 and
19 136 (ECF No. 147) is granted.

20 It is further ordered that ECF Nos. 96, 152, and 185 are denied as moot.
21 Parties may refile these motions following resolution of the pending appeal before
22 the Ninth Circuit.

23
24
25 DATED THIS 29th day of December 2023.



26
27 ANNE R. TRAUM
28 UNITED STATES DISTRICT JUDGE